IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1786 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE J.R.VORA
HONOURABLE MR.JUSTICE SHARAD D.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT
Versus
JEHABHAI HIRABHAI KOLI

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Appearance :
MR KC SHAH APP for Appellant
MR BALVANTSINH SOLANKI for Respondent

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CORAM : HONOURABLE MR.JUSTICE J.R.VORA

and

HONOURABLE MR.JUSTICE SHARAD D.DAVE

Date : 28/02/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.R.VORA)

1. This appeal is preferred, under Section 378 (1) of the Code of Criminal Procedure, by the appellant – State against the judgment and order delivered by the Additional Sessions Judge, Dhrangdhra, District : Surendranagar on 7th April, 2005 in Sessions Case No.25 of 2003 whereby the present respondent – accused came to be acquitted of the charges levelled against him under Section 302 of the Indian Penal Code.

2. While going through the Record & Proceedings which is available with us and when learned advocate Mr.Balvantsinh Solanki appears on behalf of the respondent and undertakes to file his Vakalatnama, we have also allowed his appearance and heard him. After hearing learned APP Mr.K.C.Shah for the appellant – State and learned advocate Mr.Balvantsinh

Solanki, we granted leave to appeal and admitted appeal. Learned advocate Mr.Solanki waives service for the respondent – accused.

3. The Record & Proceedings of the trial Court is available with us, both the learned counsels produce the copies of the relevant documents and evidence and request this Court to take up this matter for final hearing today. The request is granted. This matter was heard finally.

4. It appears that the deceased in the incident is one Kalusha Akbarsha Fakir, resident of Mathak, Taluka : Halvad, District: Surendranagar. The complaint of the incident appears to have been filed by one Harpalsinh Jayvantsinh Zala, which is on record at Ex.22. The complaint came to be filed before Halvad Police Station on 30th April, 2003 at 10.00 a.m. The crime, accordingly, appears to have been committed any time before 7.00 a.m on 30th April, 2003. It was stated by the informant that at the relevant juncture, he

was residing at Mathak and was an agriculturist. The deceased - Kalusha Akbarsha Fakir was staying with him and assisting him in agriculture and in household work. Kalusha was all alone as his parents were died, his wife had divorced him and only daughter had married. According to the complainant, deceased - Kalusha Akbarsha Fakir had illicit relation with the wife of the accused – respondent Jehabhai Hirabhai Koli and there was enmity between two on this account. The victim – deceased used to go at Dargah for offering prayer in early morning. On previous day of the incident, complainant as well as the deceased had been to Morbi and stayed together till 12.30 night. In the morning, while complainant was cleaning his teeth, one Ghanchi Hanifbhai Adambhai came to him and stated that the deadbody of Kalusha Akbarsha was lying in the courtyard, near the house of the accused, an injury with some wounds and on his forehead. The complainant, thereupon went to the house of Jehabhai

Hirabhai Koli and found that the said injured Kalusha Akbarsha Fakir was dead and also noticed that the deadbody of the deceased was lying in courtyard near the residential house of the accused and some body had inflicted wound on his forehead and, therefore, the complainant expressed his suspicion that earlier the deceased had illicit relation with the wife of the accused and, therefore, he inflicted injuries on the head of the deceased and after locking the house, he ran away. This complaint came to be recorded and investigation was started. During the investigation, after one and half month, the complainant had given one tap and photograph as well as one letter to the daughter of the deceased which were seized, and ultimately, PSI, Surendranagar, Nasirkhan Anvarkhan Pathan submitted the charge-sheet against the accused and on which the case came to be committed to the Court of Sessions. On 24th November, 2003 vide Ex.7 a charge came to be framed against the accused and vide Ex.8, he

pleaded not guilty. Therefore, the prosecution examined as many as 14 witnesses to prove its case and also submitted voluminous documentary evidence.

5. P.W.1 – Doctor Babulal Tribhovandas Malampara, is examined at Ex.13, who conducted postmortem of the deceased and came to the conclusion that the death was of a homicide and on account of injuries on forehead. He opined that he was not in a position to say the time of the death. P.W.2 – Rahimsha Lalsha Fakir, Ex.17, who is cousin brother of Kalusha Akbarsha Fakir and he is formal witness to depose that he was informed about the death of his cousin brother and that the incident occurred because the deceased had illicit relation with the accused. He also stated that the deadbody was lying in the courtyard of the residential premises of the accused. P.W.3 – Natubha Ranchhodbha Parmar, is examined Ex.18 and being Circle Officer, he produced the map of seen of offence. P.W.4 – Harpalsinh

Jashvantsinh Zala at Ex.21, complainant, who stated the facts of the complaint and further that from the household of the deceased, he had given one tap, one photograph as well as one letter to the daughter of the deceased. He produced F.I.R. on record at Ex.22. P.W.5 – Hanifbhai Aadambhai is examined at Ex.23 and he is a witness, who stated that he saw deadbody of the deceased lying in a street, near residence of the accused and that he was neighbour of the accused. P.W.6 – Jaypalsinh Ghanshyambhai, at Ex.24 and he being panch of inquest panchnama. He stated that he signed the inquest panchnama at Ex.25 along with second panch. P.W.7 – Ashoksinh Chandrasinh Zala is examined at Ex.26, being a panch of panchnama at Ex.27. He is a panch of panchnama of seen of offence. He stated that along with other panch, he was called wherein the complainant saw the place of offence and deadbody was lying. The police seized blood stain earth and one stone from the place of the offence. He has been asked about the

location in detail in examination-in-cross. P.W.8 – Bhagwanbhai Hamirbhai, is examined at Ex.28 and he is a panch of panchnama by which muddamal clothes of the deceased were recovered by the police through the said panchnama. However. P.W.8 - Bhagwanbhai Hamirbhai has not supported the prosecution case and declared hostile. P.W.9 – Ranjitprasad Jagannathprasad Pandit, Ex.29 is also examined as a panch of panchnama by which blood stain clothes were recovered in the Police Station by the Investigating Officer. This panchnama is placed on record at Ex.37. Panch Ranjitprasad Jagannathprasad Pandit, P.W.9 did not support the prosecution case and hence, he was cross-examined by the prosecution wherein he denied the contents of the panchnama in toto. P.W.10 – Kishansinh Arjusinh Yadav is examined at Ex.30. He stated that at relevant juncture, he was serving as ASI, Halvad Police Station and the complaint of this case regarding crime was registered and investigated by him and

thereafter, investigation was made over to CPC Shri Raval. P.W.11 – Mahendrasinh Bahadursinh Ramol is examined at Ex.31, who is also an Investigating Officer. He recorded the statements and draw the panchnama at Ex.32 and arrested the accused. P.W.12 – Kishorkumar Bhagwanjibhai Jani is examined at Ex.33 and being PSO, who was Incharge of Halvad Police Station, at the relevant juncture on 30th April, 2003, in his presence, Police Constable Dahyabhai Govindbhai presented the clothes of the deceased recovered from postmortem note along with blood sample of the deceased, which he seized vide panchnama at Ex.34. P.W.13 Vithalra Khande Sonvane, PSI is examined at Ex.35, who had arrested the accused and he produced on record FSL reports at Ex.38 and 39. P.W.14 – Nasirkhan Anvarkhan Pathan is examined at Ex.42, who was for short period an Investigating Officer, submitted the charge-sheet against the accused.

6. Along with the above testimonial collection

of evidence, the prosecution has also produced on record voluminous documentary evidence like FIR, panchnama, P.M. Report and opinion of the FSL analysis.

7. A statement, after the evidence was over, recorded of the accused - Jehabhai Hirabhai Kodi under Section 313 of the Code of Criminal Procedure wherein his defence was of total denial and he further stated that at the relevant juncture, he was staying at village Vadeshwar in the place called as “Mahadevji Vadia”. He further stated that he was cultivating the land of Mahadevji, the police had arrested him from that place and that he was innocent. It appears that the learned trial Judge, thereafter, heard both the parties at length and came to the above conclusion that the accused was entitled to acquittal and hence, this appeal.

8. Learned APP Mr.K.C.Shah vehemently argued that though there is no direct evidence against the accused, but clinching evidence

of finding of the blood stains of the group of the deceased on the clothes of the accused is unexplained circumstances which indicate that the offence must have been committed by the accused and the accused only and further that two more facts in this connection is proved by the complainant that there was illicit relation between wife of the accused and the deceased and that the second important circumstances was found that the deadbody was lying near the courtyard of the residential premises of the accused. Learned APP Mr.Shah submitted that learned trial Court manifestly erred in not taking into account of these clinching circumstantial evidence proved beyond doubt against the accused and, therefore, the appeal is required to be allowed. While learned advocate Mr.Balvantsinh Solanki for the respondent – accused has in all respect supported the judgment and order impugned in this appeal.

9. Undoubtedly, when we are dealing with an

appeal against the acquittal of the accused, the Apex Court has settled down certain principles to deal with the acquittal appeals. Needless, it is to say that the High Court possesses of the powers and nothing less than the powers, it possesses while hearing an appeal against an order of conviction. Therefore, it is necessary to reconsider the whole issue, reappraise the evidence and come to its own conclusion and finding in place of the findings recorded by the trial Court. If the said findings are perverse according to law, interference in the appeal may be justified. At the same time, it is also necessary that before such interference in the acquittal appeal, the High Court has to consider each ground of which the order of acquittal was passed and to record to its own reason for not accepting those grounds and not subscribing the views expressed by the trial Court that the accused was entitled to the acquittal.

10.Therefore, in above view of the matter, it

would be necessary first to see the reasons recorded by the trial Court for the acquittal and to assess the evidence independently and come to our own findings.

11. Learned trial Judge came to the conclusion that there was no direct evidence against the accused and the case was of circumstantial evidence. The allegation was in respect of illicit relation between the wife of the accused and the deceased and that was the reason for the occurrence of the incident. The learned Judge undertook the exercise of the appreciation of the evidence and stated that as per the establish law, the prosecution failed to prove each link of a chain of circumstantial evidence and that only evidence against the accused was in respect of blood stain found on the clothes of the accused recovered from him on which the blood group of the deceased was found by F.S.L. The learned trial Judge came to the conclusion that this fact could not be proved nor it could be proved that wife of the

accused had illicit relation with the accused nor it could be proved that the place from which the deadbody was recovered was in exclusive control of the accused. There was no evidence that the place from which the deadbody was found, was in control of the accused to the extent that except accused nobody had access to the above place. It has come in evidence that the house alleged to have been of the accused and situated near the place of incident was not inhabitated. The learned trial Judge came to the conclusion from the map of the seen of offence produced at Ex.20 that near the kachcha house alleged to have been of the accused, there is one temple of Goddess. The space is open for all around and accessible from all sides, there are other residential premises abutting to the place of offence and, therefore, the prosecution failed to prove firstly that the place of offence was exclusive in control and possession of the accused. According to the learned trial

Judge, there was no other evidence to support the say of the complainant that there was illicit relation between the wife of the accused and the deceased. The reliance was placed by the prosecution on the photographs, letters etc. given by the complainant to the daughter of the accused. Those articles were handed over by the complainant to the daughter of the deceased after one and half months of committing of the offence. Even Ghanchi Hanifbhai Adambhai, according to his cross-examination did not state before the police that the deceased had illicit relation with the wife of the accused. In respect of the blood stain found from the clothes of the accused, the learned trial Judge came to the conclusion that firstly, the prosecution failed to prove that the clothes which were sent to the FSL examination, were recovered from the accused. The relevant panchnama, according to the prosecution came to be drawn on 30th April, 2003 at 20.45 hours, which is placed at Ex.32. The complaint came to be

recorded in the morning of that day. It was not on the record throughout in the evidence that the accused was absconding. Even then, the accused was arrested on that night only i.e. on 30th April, 2003. It would be difficult to accept the theory of the prosecution. According to the learned trial Judge that as soon as the accused was arrested, he voluntarily handed over the clothes which he had worn at the time of offence. On the contrary, it has been revealed from the evidence of the complainant that the accused was present in the Police Station on 30th April, 2003 at 10.00 a.m. when FIR was being recorded. The learned trial Judge, therefore, observed that had it been so then why the accused was not arrested at very juncture and the prosecution theory proceeds that he was arrested at night at 21.30 hours and the facts which are in evidence, according to learned Judge comes to that though the accused was present at 10.00 a.m. on 30th April, 2003, he was allowed to

go. He changed the clothes and came to the police on his own at 21.30 hours and volunteered his clothes, which recovered, which contained blood stains of the blood group of the deceased. Learned trial Judge observed that this theory was hardly probable and acceptable. Otherwise also, it was observed that in absence of other clinching evidence, the only evidence of having stains of blood on the clothes of the accused of the blood group of the deceased, it would not be enough to convict the accused on this piece of evidence only. The learned trial Judge, therefore, acquitted the accused.

12. Undoubtedly, the case rests on the circumstantial evidence and no direct evidence was available. It is not the law that the trials cannot be proved beyond doubt by circumstantial evidence, but the law is well settled that in the cases of the circumstantial evidence, the prosecution has to prove each link of the chain of the circumstances leading to the guilt of the

accused and accused only and not indicating the innocence of the accused. The prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness of the defence. The various links in chain of evidence that is each circumstance must be proved with reasonableness, must be proved beyond doubt to draw the conclusion of the guilt of the accused. Those circumstances should be of a conclusive nature and tendency. There must be a chain of evidence so complete, as not leave any reasonable doubt or ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

13. Keeping in mind as law requires, we have undertaken our own assessment of the evidence. We find that three circumstances appear to have been relied upon by the prosecution to prove the guilt of the accused – respondent. Firstly, illicit relation between the wife of the accused and the

deceased, secondly finding of the deadbody in the courtyard of the residential house of the accused and thirdly finding of the stain of blood on the clothes recovered from the accused and such stains forming the group of the blood of the deceased. What we have observed above on such type of case, all the three above circumstances must be proved by prosecution, so as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and by proving those three grounds, the only conclusion might be that, in all human probability the act must have been done by the accused and accused only. When we undertook the appreciation of the evidence in totality, there is no evidence at all to come to at definite conclusion that there was illicit relation between the wife of the accused and the deceased. The articles which were handed over by the complainant to the daughter of the deceased fails to conclude illicit relationship, firstly because the

complainant delivered those articles i.e. letters, photographs etc. to the daughter of the accused after one and half month of the crime and that at the most it might be indicating proximity, but not illicit relation. Likewise, it has come in the evidence positively that the place of offence where the deadbody was found is accessible to all and was not in exclusive control of the accused and accused only, nor could it be proved beyond doubt that nearby residential house alleged to have been of the accused, was inhabitated by the accused at the relevant juncture. We come to the conclusion that the second circumstances as discussed by the learned trial Judge could not be proved beyond doubt by the prosecution. In this view of the matter, when out of three circumstances, two circumstances are not proved, it would not at all be safe to convict the accused only on circumstances of finding stains of blood on the clothes of the deceased pertaining to the blood stains of

the group of the accused from the clothes of the accused. This evidence itself, when appreciated and examined, is found not proved beyond doubt as discussed by the learned trial Judge. Therefore, while undertaking independent exercise of assessing the evidence, we are unable to reach to any other findings than arrived at by the learned trial Judge that the prosecution failed to prove the case beyond reasonable doubt against the accused. We, therefore, do not find any reason to interfere with the grounds of acquittal as observed by the learned trial Judge. The interference, therefore, in the judgment and order impugned in this appeal is not possible.

14. In this view of the matter, this appeal stands dismissed.

[J. R. VORA,J.]

[SHARAD D. DAVE,J.]

(vijay)